(10)

No. 91-990

In The

Supreme Court of the United States

October Term, 1991

DALE FARRAR and PAT SMITH, Co-Administrators of the Estate of Joseph D. Farrar, Deceased, *Petitioners*,
vs.

WILLIAM P. HOBBY, JR., *Respondent*.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WYOMING, THE COMMONWEALTH OF PUERTO RICO, THE TERRITORY OF GUAM, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Fifth Circuit's judgment, denying all attorneys fees to Petitioners, who won only a one dollar nominal damages judgment, should be affirmed either on the basis that Petitioners were not "prevailing parties" under 42 U.S.C. § 1988, or, alternatively, on the basis of the congressionally mandated rule barring fees if "special circumstances" make "an award unjust"?

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INTEREST OF THE AMICI CURIAE

The States, Commonwealths, and Territories who appear by this brief amici curiae have an abiding interest in this case, in which the Fifth Circuit concluded, as a

matter of law, that Petitioners, who won nothing more than a one dollar nominal damages judgment, should be awarded no attorneys' fees under the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988.

As government entities, the amici are generally not liable for damages under the federal laws to which § 1988 applies.[1] *See Ngiraingas v. Sanchez*, 495 U.S. 182 (1990); *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *see also Quern v. Jordan*, 440 U.S. 332 (1979). Attorneys' fees in nominal damages cases, if appropriate, would therefore generally be paid by individual state officers out of their own assets, municipal corporations which do not share the States' Eleventh Amendment immunity, or private insurance. Nonetheless, the amici States, Commonwealths, and Territories have an important interest in the manner in which their municipalities and officers are treated in damage suits generally, and, specifically, in those cases where the defendants in such suits have proven that plaintiff suffered no damage whatsoever, and thus only nominal damages may be awarded. Because the amici States, Commonwealths, and Territories strongly believe that the Fifth Circuit was correct in reversing a District Court judgment that mandated a

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[1] Although there is no legal obligation to do so, some States, as a matter of practice, do pay attorneys' fees awards against their State personnel. This practice is intended to recruit and retain qualified individuals for public positions and conforms with legislative intent and state policy to protect state personnel from liability so long as they are acting within the scope of their public duties and responsibilities and are not acting with malice or gross negligence. *See, e.g.*, Md. Ann. Code State Gov't Art. § 12-402 (1984); Mass. Gen. L. ch. 258, § 9 (1992). Georgia maintains a self-insurance fund for payment of judgments and attorney fee awards against officers and employees. *See* O.C.G.A. ch. 9, tit. 45 (1990).

former state official to pay, out of his personal account, attorneys' fees and costs under 42 U.S.C. § 1988 in excess of $317,000 for incurring a mere one dollar liability for purely nominal damages, we urge this Court to affirm the judgment below. We do so not only because the Fifth Circuit was correct in concluding that, under this Court's precedents, Petitioners were not "prevailing parties" in the District Court action underlying this appeal, but also because the judgment of the Fifth Circuit is correct as a matter of law in that the facts here make a fee and cost award so unjust as to warrant the total denial of any relief under 42 U.S.C. § 1988.

SUMMARY OF ARGUMENT

1. The Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988 ["Fees Act"], was not intended, and has not been viewed by this Court, to authorize awards of substantial attorneys' fees where only nominal damages are granted. Although Congress was concerned, when it passed the Fees Act, with suits for equitable relief where no damages would be awarded, not one shred of the legislative history supports the conclusion that a nominal damages award, without more, could give rise to an entitlement to substantial fees under 42 U.S.C. § 1988. Congress's intent, in passing the Fees Act, was to restore the "private attorney general" doctrine, which was rejected, absent congressional authorization, in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Prior to *Alyeska*, that doctrine would not permit a federal plaintiff who had won a mere one dollar judgment to claim fees under a federal court's equity power. Because 42 U.S.C. § 1988, as amended by Congress in 1976, was a direct response to *Alyeska*, this Court should

not interpret that amendment as going further than the pre-*Alyeska* "private attorney general" theory would allow. That theory would not allow fees here, and the judgment below is correct.

2. Even in the absence of such legislative history, the Petitioners have not shown, and could not show now, that they "prevailed" in the manner this Court required in its unanimous opinion in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989). Plaintiffs failed to show success "on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.' " *Id.* at 791-92 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). In addition, and most importantly, they could not show anything beyond "a technical victory" that did not effect a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Id.* at 792-93.

3. Even assuming, *arguendo*, that Petitioners might be "prevailing parties" for purposes of 42 U.S.C. § 1988, that is not the end of the inquiry, for this Court may affirm the judgment on the ground that the circumstances in this case would make " ' "an award unjust." ' " *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citations omitted). The "special circumstances" doctrine is uniquely suited to this case, for the controversy upon which even Petitioners' claim to have prevailed is "more contrived than real," and thus undeserving of fees. In addition, in this case, the underlying merits judgment, which triggered any right to attorneys' fees in the first place, is apparently inconsistent with all principles of substantive law, and, as well, virtually all precepts of qualified immunity doctrine. *See, e.g., Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991).

Contrary to the views of the dissenting judge below, it ought not be too late, at the fee stage in a nominal damages judgment, to consider the relative strength of the parties' claims and defenses in determining if a fee should be awarded. Here, that consideration counsels this Court's affirmance.

ARGUMENT

A. Congress Did Not Intend the Fees Act to Allow Awards of Attorneys' Fees in Those Cases Where Nominal Damages Constituted the Only "Victory" by the Federal Plaintiff.

As this Court has recognized on many occasions, the 1976 amendments to 42 U.S.C. § 1988 were a specific response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). *Alyeska* reaffirmed the "American Rule" with regard to fee-shifting, namely, that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska*, 421 U.S. at 247. As *Alyeska* held, without congressional authorization, or a showing of misconduct by the losing party, there was no power under federal law to tax attorneys' fees against a losing defendant, even under the "private attorney general" theory by which the lower federal courts were awarding private litigants, in certain classes of suits against the United States, the States, their officers, or private parties, their reasonable attorneys' fees.

Because, contrary to Petitioners' understanding, attorneys' fees in non-class, nominal damages cases were *not* awarded under the "private attorney general" theory rejected in *Alyeska*, that Fees Act, which restored

pre-*Alyeska* law and no more, cannot be viewed as codifying an understanding of the term "prevailing party" that permits fee awards in such cases. This view of the legislative history accords with the committee reports and floor debates, and is reflected in the statutory language of section 1988 itself. For these reasons alone, the judgment of the Fifth Circuit is totally correct, and should be affirmed.

Congress's enactment of the Fees Act in 1976 was narrowly targeted to restore the law to the status that had obtained before this Court entered its decision in *Alyeska*. *See* S. Rep. No. 94-1011, 94th Cong. 2d Sess (1976) at 1 (citing *Alyeska*); H.R. Rep. No. 94-1588, 94th Cong. 2d Sess. (1976) at 2 (same). Thus, as Senator Kennedy observed, the Fees Act "is intended simply to expressly authorize the courts to continue to make the kinds of awards of fees that they had been allowing prior to the *Alyeska* decision." 121 Cong. Rec. S16252 (daily ed. Aug. 1, 1975). Representative Drinan, the floor manager in the House, made this point as well, stating that the Fees Act "does not overturn law or practice, except the *Alyeska* case." 122 Cong. Rec. H12163 (daily ed. Oct. 1, 1976). *See also* 122 Cong. Rec. H12154 (daily ed. Oct. 1, 1976). As Representative Railsback, another important co-sponsor of the legislation urged, "what we are really doing is codifying the practice that was going on prior to the *Alyeska* case"); *id.* at H12161 (same); *id.* at H12163 (remarks of Reps. Fish and Kastenmeier) (same).

The "private attorney general" doctrine, as elaborated by this Court in *Alyeska*, was utterly incapable of counseling a fee award in a pure nominal damages case such as this. While Justice White's opinion for the Court was critical of the private attorney general doctrine as

yielding outcomes that were "extremely difficult to predict," the *Alyeska* majority recognized that that doctrine was confined to situations "in which the purported benefits [of the success obtained] accrue to the general public." *Alyeska*, 421 U.S. at 265 n.39. As Justice Marshall wrote, a private attorney general fee was to be allowed only if "the important right being protected is one actually or necessarily shared by the general public or some class thereof." 421 U.S. at 240 (Marshall, J., dissenting).

In light of these shared understandings as to the scope of the private attorney general theory, it is obvious that Petitioners would not have been eligible to obtain a fee award under that doctrine prior to *Alyeska*. Petitioners did not enjoy any right "actually or necessarily shared by the general public or some class thereof." No equitable relief was entered against any "policy" or standing practice of Respondent, no out-of-court practices were changed by reason of the judgment, no class was certified (and, perforce, no classwide relief was ordered), and, indeed, no injury (which may in some cases indicate a risk of harm to others in the future) was found. Under the private attorney general theory at stake in *Alyeska*, Petitioners' claim would have been undeserving of a fee recovery. In light of the history of section 1988, the fee claim here is no better today.

Indeed, specific applications of the private attorney general doctrine, prior to *Alyeska*, to cases involving nominal or small damage awards to a small group of plaintiffs show this compellingly. In 1974, for example, after the court of appeals for the District of Columbia Circuit had issued its decision in *Alyeska*, but before this Court had reversed, Judge Gasch ruled that the "private attorney

general" doctrine was "more circumspect" than an automatic rule by which "costs" were to be awarded as a matter of statutory mandate. Accordingly, the "private attorney general" doctrine would not support an award of fees even when a group of federal plaintiffs had won not just nominal damages, but actual (albeit small) compensatory damages of $100 each. *Tatum v. Morton*, 386 F.Supp. 1308, 1316 (D.D.C. 1974), *rev'd on other grounds*, 562 F.2d 1279 (D.C. Cir. 1977). Indeed, a searching review of the caselaw extant at the time this Court decided *Alyeska* makes very clear that the private attorney general theory which Congress restored in the Fees Act was wholly incapable of supporting an attorneys' fee award in a nominal damages case where plaintiff won only one dollar.[2]

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[2] Petitioners' effort, made apparently for the first time in this Court, to find cases where fees were awarded in pure nominal damage judgment actions prior to *Alyeska* (*see* Pet. Br. at 23 & n.10 (citing cases)), is misleading, and ultimately unconvincing. In *Skehan v. Bd. of Trustees*, 501 F.2d 31 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975), the Third Circuit held nothing with respect to attorneys' fees, stating only that if the District Court awarded backpay, fees should be considered under a private attorney general theory. *See* 501 F.2d at 45. *Brito v. Zia Company*, 478 F.2d 1200 (10th Cir. 1973), did not involve solely a nominal damages judgment. In *Brito*, Plaintiffs won a substantial conciliation agreement, and an injunction, in addition to nominal damages for a temporary breach of the agreement. *Thonen v. Jenkins*, 374 F.Supp. 134 (E.D.N.C. 1974), *aff'd on other grounds*, 517 F.2d 3 (4th Cir. 1975), involved awards of compensatory damages of $200, while *Berry v. Macon County Bd. of Education*, 380 F.Supp. 1244 (M.D. Ala. 1971), granted reinstatement, "including retirement credits and general raises in pay, if any, which the plaintiffs would have received had

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At the heart of this conclusion was the notion that the private attorney general doctrine should not unduly discourage a defendant with meritorious defenses from defending on the merits. *Id.* at 1317 (citing and quoting *Alyeska*, 495 F.2d 1026, 1032 (D.C. Cir. 1974)). As Judge Gasch wrote in *Tatum*:

> It should be clear from this discussion that the private attorney general exception adopted by this Circuit in *Wilderness Society* is much too narrow to fit the case at bar. The prospect of paying plaintiffs' attorneys' fees might have compelled the defendant District of Columbia government to make any settlement, including one which might have been considerably more substantial than the damages awarded by this Court, to stay out of court.

386 F.Supp. at 1317. Judge Gasch further observed, as to suits for nominal or small damages, that while the private attorney general doctrine would not apply, the obligations of the private bar would suffice to encourage a sufficient number of suits lest the bar wish to "lend credence to the public's cynical perception of lawyers as

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their employment not been terminated," as well as a nominal damages award, *id.* at 1247-48. Petitioners' emphasis on *Hammond v. Housing Authority*, 328 F.Supp. 586, 588 (D. Ore. 1971), is even more telling. The only reason Plaintiffs did not receive injunctive relief in that case was that "defendant voluntarily discontinued the practice" which was the subject of the lawsuit. *Id.* at 588. This out-of-court victory constitutes independent "success" which this Court has recognized may be the subject of a fee award. The suggestion that *Hammond* involved a pure nominal damages award, and nothing else, is unfounded.

comprising a profession motivated solely by self interest if not greed." *Id.* at 1319.[3]

As the legislative history confirms, fee awards might be available under the private attorney general doctrine when a " 'broad class intended to be benefitted [by the substantive law]' " was affected, even though the wrong at issue "cause little injury to any one individual," 122 Cong. Rec. S16433 (daily ed. Sept. 22, 1976) (remarks of Senator Allen (quoting *Alyeska*, 495 F.2d at 1030)). Yet none of the debates, or committee reports, even suggest that any fees be awarded in nominal damages cases that affect a class of two plaintiffs.

Indeed, in adopting, in the 1976 Act, a fee provision analogous to that in effect under § 4 of the Clayton Act, Congress was aware that in § 4 cases courts would refuse to grant fees that "shocked the conscience," and, as well, that where only damages were awarded, the judicial conscience was uniformly "shocked" at fees equal to more than seventy-eight per cent of a damage award. *See* 122

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[3] The scholarly commentary concerning the "private attorney general" theory of fee recovery further supports the conclusion that fees could not be awarded under that theory for a purely nominal damages judgment. One author, writing in 1973, noted that the private attorney general doctrine applied only to "private parties litigating issues that are important and beneficial not only to the plaintiff, but also to a wide segment of the public." P. Nussbaum, "Attorney's Fees in Public Interest Litigation," 48 *N.Y.U. L. Rev.* 301, 318 (1973). As shown above, however, a pure nominal damages case shares none of these traits. *See also* R. Shapiro, "The Enforceability and Proper Implementation of § 1983 and the Attorneys' Fees Awards Act in State Courts, 20 *Ariz. L. Rev.* 743, 754 & n.82 (1978) (Private attorney general theory was justified on the basis that litigant was vindicating rights "not only for the individual plaintiff, but also for all others similarly situated.") (citing cases).

Cong. Rec. S16559 (daily ed. Sept. 27, 1976). Congress did recognize that obtaining substantial damages against civil rights defendants would frequently require greater skill and time than in the typical tort case, in that "immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." H.R. Rep. No. 94-1588, 94th Cong. 2d Sess. at 9 (1976) (citing this court's immunity decisions in *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); and *Pierson v. Ray*, 386 U.S. 547 (1967)). But this recognition does not in any way signify an intent that defendants who are assessed one dollar in nominal damages be required to pay attorneys' fees.

In sum, while Congress was plainly concerned that fees be awarded upon meritorious claims for significant relief, "particularly in injunction cases where there is no monetary benefit to be gained by the plaintiff," *see* 122 Cong. Rec. H12155 (daily ed. Oct. 1, 1976) (remarks of Rep. Seiberling), Congress plainly did not intend that the Fees Act trigger an obligation to pay fees for insignificant, technical results. Indeed, to create a statute that did otherwise, Congress made plain, would be to create "a food stamp bill for lawyers." 122 Cong. Rec. H12164 (daily ed. Oct. 1, 1976) (remarks of Rep. Jordan). In enacting the 1976 Fees Act, Congress made clear that the Act was "not going to work that way." *Id.* (remarks of Rep. Jordan).

In fact, a view of the Fees Act that allows fees to be granted upon claims for nominal damages, particularly where large damages were sought, is also at odds with the plain language of the Act, which allows fees to be awarded only to "*the* prevailing party." It defies both common sense and the plain language of the Act to term

a suit where only a single claim is litigated, and the defendant succeeds in limiting liability to one dollar, a "victory" for the plaintiff. *Cf. Hewitt v. Helms,* 482 U.S. 755, 762 (1987). Because neither the plain language nor the legislative history support Petitioners' reading of the Fees Act, this Court should affirm the Fifth Circuit's ruling.

B. This Court's Decision in *Texas State Teachers Association v. Garland Independent School District,* 489 U.S. 782 (1989), Squarely Requires Affirmance of the Fifth Circuit's Judgment.

In adjudicating that Petitioners were not "prevailing parties" under § 1988, the Fifth Circuit did not even need to plumb the legislative history. This Court's decision in *Texas State Teachers Association v. Garland Independent School District,* 490 U.S. 782 (1989), completely supports, indeed mandates the result reached by the Fifth Circuit. As *Garland* states clearly:

> The floor in this regard is provided by our decision in *Hewitt v. Helms,* 482 U.S. 755 (1987). As we noted there "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.,* at 760. Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. *Id.,* at 760-61; *Rhodes v. Stewart,* 488 U.S. 1, 3-4 (1988). Beyond this absolute limitation, a technical victory may be so insignificant and may be so near the situations addressed in *Hewett* and *Rhodes,* as to be insufficient to support prevailing party status. For example, in the context of this litigation, the District Court found that the requirement that

> nonschool hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague. App. to Pet. for Cert. 58a. The District Court characterized this issue as "of minor significance" and noted that there was "no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours." *Id.,* at 60a, n.26. If this had been petitioners' only success in the litigation, we think it clear that this alone would not have rendered them "prevailing parties" within the meaning of § 1988. Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis,* a district court would be justified in concluding that even the "generous formulation" we adopt today has not been satisfied.

489 U.S. at 792.

This language, which forms the central focus of debate in this case, could not more clearly indicate this Court's refusal to countenance fee awards in pure nominal damages cases. At the outset, Petitioners plainly did not receive "some relief on the merits of [their] claim," *id.,* for *that* claim was for seventeen *million* dollars. As this Court ruled in *Rhodes,* merely being a judgment winner is not enough to qualify for § 1988 fees. *See* 488 U.S. at 4. Petitioners did not receive relief on *the* "money claim" filed in the District Court, and hence, did not obtain "the substance of what [they] sought." *Hewitt v. Helms,* 482 U.S. at 761.

But the more important point in cases such as this is that the Petitioners' "success" was obviously "purely technical or de minimis," as those terms are used in *Garland.* A comparison of the District Court's judgment nullifying the Garland School District's rules relating to nonschool hour meetings shows why. For that judgment

to be correct, the *Garland* plaintiffs were required to show not only imminent application of the rule, but the possibility of repetitive prosecutions without any adequate opportunity to present federal defenses in state courts. *See Morales v. TWA*, 60 U.S.L.W. 4444, 4445 (U.S. June 1, 1992) (citing, *e.g., Ex parte Young*, 209 U.S. 123 (1908)). Surely, putting a stop to this sort of imminent, threatened, and ongoing injury is closer to the core of relief which Congress intended to cover by the Fees Act than is the Pyrrhic victory of winning a dollar on a claim in which no injury was inflicted, and, insofar as equitable relief was abandoned or denied, it is the controlling law of the case that no injury would be in any likely way inflicted in the future. *Garland* is therefore controlling *a fortiori*. In any case, at the very least, in a pure nominal damages case, like the case of the unenforced meetings rule at issue in *Garland*, the lack of any injury whatsoever compels the denial of any fee under 42 U.S.C. § 1988.

Both Petitioners' and the American Bar Association's responses to *Garland*'s mandate are unconvincing, and, indeed, ultimately unresponsive to this holding. For their part, Petitioners simply urge, without any reasoning, that *Garland* is inapplicable because their "victory" was neither "meaningless," nor "non-compensable." *See* Pet. Br. at 13. Such a response is no response at all. The American Bar Association likewise never addresses *Garland*'s language concerning "technical, de minimis" success, and that language's direct applicability to nominal damages cases, preferring instead to pick nits with the language of the Fifth Circuit's decision. *See* A.B.A. Brief at 10-17. However, as this Court has repeatedly held, this Court reviews "judgments, not opinions," *see, e.g., Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837,

842 (1983), and the Fifth Circuit's judgment denying fees is plainly correct. As this Court observed in *Garland*, at some point "the degree of plaintiff's success" is so small that it can be characterized as "technical, or *de minimis*." *Cf.* A.B.A. Brief at 13. In that instance, a Plaintiff is not a "prevailing party" under § 1988.

Contrary to the arguments of Petitioners and their amici, a rule, based on the *Garland* requirement of a victory that crosses the line from "technical, or *de minimis*" success, does not require the lower courts to assess a plaintiff's "true" mental state in bringing suit, and does not amount to the "central issue" test which was rejected in *Garland*. Rather, such a rule recognizes that "[t]he touchstone of the prevailing party inquiry must be the *material* alteration of the legal relationship of the parties *in a manner which Congress sought to promote in the fee statute.*" *Garland*, 489 U.S. at 792-93 (emphasis added). Technical "alteration of the legal relationship of the parties" will not do. There is thus no good reason to hold that Congress thought nominal awards would trigger § 1988 fees.[4]

Indeed, there are many good reasons not to hold that a nominal award creates a "prevailing party" entitlement to fees.

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[4] The American Bar Association's argument that affirmance here "would render the availability of a fee award potentially depending 'on the timing of a request for fees' " (A.B.A. Br. at 13) presumes that fees *pendente lite* are awardable in a damages case bifurcated into liability and damages phases. An award, in such a case, at the liability phase, would, however, be in direct conflict with this Court's ruling in *Hewitt*. Thus, the American Bar Association's argument is wholly without merit.

First among these is the fact that subdividing a single claim for damages into discrete parts, each of which are eligible for "prevailing party" status, can only lead to proliferation of attorneys' fee disputes. In this regard, Petitioners' approach will disserve the purposes of the Act, as plaintiffs sue for their "reasonable fee" in obtaining a "victory" on a claim for the "first dollar" in damages, and defendants sue for their "reasonable fee" in what, in any nominal damages case, will be a good claim that having to defend against a $17 million judgment was an onerous burden, imposed only through a frivolous *ad damnum* clause in the complaint. This Court has repeatedly held, however, that fee litigation is not to overshadow merits disputes. *See, e.g., Webb v. Dyer County Board of Education*, 471 U.S. 234, 244 n.19 (1985) (noting that fee litigation is " 'one of the least socially productive types of litigation imaginable' ") (citations omitted). Characterizing a nominal damages award as simply reflecting a judgment upon a single, non-frivolous claim upon which plaintiff did not prevail would eliminate the proliferation of such unproductive litigation over attorneys' fees.

Second, granting fees in such technical, *de minimis* cases of relief places enormous pressure on individual capacity and municipal defendants to settle damage claims wholly irrespective of the merits of claims or defenses. The claim that such defendants are being discriminatorily denied *their* day in court by such draconian operation of the Fees Act is substantial, and counsels reading the Act with lenity. *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 (1985) (citing *Ashwander v. TVA*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring)). At the least, in the absence of a clear statement from Congress that pure nominal damage awards in individual capacity cases were to trigger attorneys' fees, this Court should uphold the Fifth Circuit's judgment.

Third, an interpretation of the Fees Act that condones the award of large fees in nominal damages cases can have a distorting effect on the law itself. To the person on the street, an award of many thousands of dollars in attorneys' fees for a one dollar victory is irrational, unjust, and nonsensical. Courts are undoubtedly sensitive to this fact, and it is questionable whether awarding the sort of irrational fees that were awarded in this case will yield greater compliance with constitutional precepts. Instead, it may well produce, in the lower courts if not this Court, an undue narrowing of substantive constitutional law that will make the issue of damages irrelevant, to the detriment of civil rights. Surely no one can argue that this latter, plausible response to Petitioners' conception of "prevailing party" would work to benefit plaintiffs in the sorts of broad, complex, structural equity cases where Congress did intend that Fees Act would require an award.

In short, as the Fifth Circuit found, the judgment of the District Court holding Petitioners' were "prevailing parties" was error, and properly reversed. That reversal should stand.

C. Alternatively, this Court Should Affirm the Judgment on the Ground that Circumstances Render an Award Unjust.

Although the Fifth Circuit did not address it, the law underlying § 1988 awards has always been that even a

"prevailing party" should be denied a fee when " ' "special circumstances would render such an award unjust." ' " *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 94-1011, at 4 (1976) (quoting in turn *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968))). Because the law of federal appellate practice is that the Court "may affirm on any ground that the law and record permit and that will not expand the relief granted below," *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984), amici submit the "special circumstances" doctrine as an alternative ground of affirmance of the Fifth Circuit's ruling.

The foregoing discussion indicates that, at the very least, this case is at the margins of Congress's intent in enacting § 1988, and that, on a variety of fronts, granting an award would not serve Congress's purpose. As the First Circuit's ruling in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), makes clear, the special circumstances doctrine is particularly suited to those cases where the controversy is " 'more contrived than real,' " even if a plaintiff could be deemed to have "prevailed." *See id.* at 279 n.3 (quoting *Naprstek v. City of Norwich*, 433 F.Supp. 1369 (N.D.N.Y. 1977)). The issue in this case, of course, is not whether the Court should abolish the practice of awarding nominal damages in cases where no injury whatever is shown, but whether *fees* should be awarded to counsel who file suits for damages, and win nothing more than a mere one dollar judgment.

Such suits clearly meet the test for controversies that are "more contrived than real," for the entry of nominal relief is purely symbolic, and unconnected to any "real" injury. It matters not, on this front, that a plaintiff has "won." Rather, it is simply unjust to award him or her an attorneys' fee.

Even if the Court were not inclined to foreclose fee awards in all pure nominal damages award cases, it should plainly do so in *this* case so as to clarify the factors that permit a "special circumstances" denial. Above and beyond the factors discussed previously, the original judgment which triggered this fee controversy is in all likelihood wrong as a matter of law. Indeed, as even the dissenting judge in the fee appeal below stated, one has "difficulty understanding the justification for the finding that Governor Hobby violated plaintiffs' civil rights." *See Estate of Farrar v. Cain*, 941 F.2d 1311, 1317 (5th Cir. 1991) (Reavley, J., dissenting).

As Respondent points out, this case arose out of former Lieutenant Governor Hobby's asserted role in requesting an investigation of Artesia Hall, the institution run by Petitioners' decedent. These requests, at most, constituted nothing more than unprivileged libel under the law of Texas, and could not possibly be the subject of a federal suit for damages. Indeed, this Court, only last Term, held that such claims not only fail to establish a violation of "clearly established" federal law, they fail to show "a violation of a constitutional right at all." *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991).

This Court's decisions have, at least implicitly, recognized that a "special circumstances" finding is mandated as a matter of law in a case like this. In *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the Court strongly suggested that prevailing in a case that was "borderline" on the merits ought not counsel fees. Likewise, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 n.10 (1978), the Court cited with approval the Fourth Circuit's decision in *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976), where the defendant was spared under the

special circumstances doctrine from attorneys' fee liability, even though it was found to have been in violation of the law, as it acted in objective good faith. Here, it is quite obvious that Respondent not only acted in good faith, but in fact committed no constitutional breach at all. *See also Garland*, 489 U.S. at 791 (citing *Nadeau v. Helgemoe, supra*, with approval as to the scope of § 1988).

The amici States, Commonwealths, and Territories, submit that a federal court, sitting at the attorneys' fee stage in a wrongly decided damages case, not only has the authority, but the duty, under the "special circumstances" doctrine, to set the record straight. This authority should be applied here to affirm the judgment. Particularly where the jury itself has found Petitioners' case to be worth nothing, circumstances do indeed make an award unjust.

For these added reasons, the Court should affirm.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit denying an award of attorneys fees should be affirmed.

Respectfully submitted, June 15, 1992.

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